No. 97-174

# In the Supreme Court of the United States

OCTOBER TERM, 1997

CASS COUNTY, MINNESOTA, ET AL., PETITIONERS

*v.*

LEECH LAKE BAND OF CHIPPEWA INDIANS

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

SETH P. WAXMAN
*Solicitor General*
LOIS J. SCHIFFER
*Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
BARBARA MCDOWELL
*Assistant to the Solicitor General*
JAMES C. KILBOURNE
JUDITH RABINOWITZ
SYLVIA F. LIU
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether Cass County may lawfully impose an ad valorem tax on lands owned in fee by the Leech Lake Band of Chippewa Indians and situated within the Leech Lake Reservation.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page





Cases—Continued: Page

# In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-174

CASS COUNTY, MINNESOTA, ET AL., PETITIONERS

*v.*

LEECH LAKE BAND OF CHIPPEWA INDIANS

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

## INTEREST OF THE UNITED STATES

The United States, because of its special relationship with Indian Tribes, has an interest in the preservation of traditional tribal immunities from state or local taxation. Such immunities promote the important federal policies, reflected in numerous Acts of Congress, of tribal self-government and economic self-sufficiency.

## STATEMENT

1. Respondent Leech Lake Band of Chippewa Indians ("the Band") is a federally recognized Indian Tribe. It operates under a constitution adopted by the Minnesota Chippewa Tribe and approved by the Secretary of the Interior pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461-494. The Leech Lake Reservation was established by the Treaty with the Chippewa Indians, February 22, 1855, 10 Stat. 1165, and was augmented by subsequent treaties and executive orders. The Reservation currently covers an area of 588,684 acres within the

northern Minnesota counties of Cass, Itasca, and Beltrami. See Pet. App. 2-3, 32; *State* v. *Forge*, 262 N.W.2d 341, 346 (Minn. 1977), appeal dismissed, 435 U.S. 919 (1978); *Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F. Supp. 1001, 1002, 1004-1006 (D. Minn. 1971).

In 1889, Congress adopted the Nelson Act, ch. 24, 25 Stat. 642, which is the principal statute at issue here. Section 3 of the Nelson Act provided for the allotment of lands on Minnesota Indian reservations, including the Leech Lake Reservation, to individual tribal members. Those allotments were to be made "in conformity with" the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (also known as the Dawes Act), which generally "empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers." *DeCoteau* v. *District County Court*, 420 U.S. 425, 432 (1975). Sections 4 and 5 of the Nelson Act provided for the sale of surplus "pine lands" on the Minnesota reservations for commercial lumbering purposes, and Section 6 provided for the sale of surplus "agricultural lands" to non-Indian settlers pursuant to the Homestead Act of 1862, ch. LXXV, 12 Stat. 392. The Nelson Act, like the General Allotment Act, had two purposes: first, to respond to the "continuing demand for new lands for the waves of homesteaders moving west," and, second, to advance the Indians' "assimilation into American society," which was expected to occur once they "abandon[ed] their nomadic lives on the communal reservations and settle[d] into an agrarian economy on privately owned parcels of land." *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984); *State* v. *Clark*, 282 N.W.2d 902, 905-906 (Minn. 1979), cert. denied, 445 U.S. 904 (1980).[1]

---

[1] The Nelson Act allowed Minnesota Chippewa Indians to take allotments either on the White Earth Reservation or on their own reservations. Most of the Leech Lake Band chose the latter course. Pet. App. 7. The courts have recognized, and petitioners have not disputed, that the Leech Lake Reservation "has never been disestablished or diminished" as a result of the Nelson Act or otherwise. *Id.* at 3 (citing *Forge*, 262 N.W.2d at 343-344; *Herbst*, 334 F. Supp. at 1002).



Between 1980 and 1992, the Band purchased, and thereafter held in fee, 21 parcels of land in the Cass County portion of its Reservation. The parcels originally had been conveyed to individuals, Indian and non-Indian, pursuant to the three types of dispositions provided for in the Nelson Act: 13 of the parcels had been allotted to tribal members under Section 3 of the Act; seven parcels had been sold to non-Indians as commercial pine lands under Sections 4 and 5; and one parcel had been sold to a non-Indian homesteader under Section 6. All of the parcels were held by non-Indians immediately before their reacquisition by the Band. Pet. App. 7-8, 33.

In 1993, after this Court's decision in *County of Yakima* v. *Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), Cass County began levying an ad valorem tax on all of those parcels. Under protest and to avoid foreclosure, the Band paid more than $64,000 in taxes, interest, and penalties. Pet. App. 8, 33.

2. The Band filed suit in federal district court, seeking a declaration that the properties are exempt from county taxation, injunctive relief against assessment of the taxes, and the refund of all property taxes, interest, and penalties paid to the County. Pet. App. 51-58. The district court dismissed the action on summary judgment. *Id.* at 30-49. In concluding that the Band's land was subject to county taxation, the district court relied primarily on *Yakima*, which held that Indian-owned fee lands allotted under the General Allotment Act were not immune from a county ad valorem tax. The district court construed *Yakima* as having set forth a rule that "if Congress has made Indian land freely alienable, states may tax the land." *Id.* at 37.

In the alternative, the district court held that, if *Yakima* did not stand for the proposition that "alienability equals taxability" in all circumstances, then only the 13 parcels originally allotted to individual Indians under Section 3 of the Nelson Act would be taxable, because only Section 3 "incorporated the terms of the [General Allotment Act]" that were construed in *Yakima*. Pet. App. 48. The eight parcels that had been disposed of under Sections 4, 5, and 6, which made no reference to the General Allotment Act, could not be taxed by the County under the court's alternative reading of *Yakima*. *Ibid.*

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1-29. As an initial matter, the court read *Yakima* to have reaffirmed the requirement that Congress must make "unmistakably clear" its intent to subject Indian lands to state or local taxation. See *id.* at 14-15 (quoting *Yakima*, 502 U.S. at 258). The court therefore rejected Cass County's argument that Congress automatically subjects Indian lands to state or local taxation simply by making those lands alienable. *Id.* at 12-15.

The court of appeals further read *Yakima* as having found a sufficiently clear expression of congressional intent to allow taxation of Indian allotments in the combination of Sections 5 and 6 of the General Allotment Act, as amended by the Burke Act of 1906, ch. 2348, 34 Stat. 182. Pet. App. 17-21. Section 5 authorized the government to issue a fee patent to an Indian allottee at the expiration of the statutory trust period, and provided that "any conveyance * * * of the lands" or "any contract made touching the same" would be invalid if made before that time. 25 U.S.C. 348. Section 6, as amended by the Burke Act, provided that allottees would be subject to state civil and criminal jurisdiction "[a]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee." 25 U.S.C. 349. It also authorized the



Secretary of the Interior to issue a fee patent before the expiration of the trust period if the allottee was competent, at which time "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." 25 U.S.C. 349. The court of appeals concluded that Section 6, as amended by the Burke Act, "is thus the primary source of the requisite clear congressional intent to allow state ad valorem taxes on Indian lands," because Section 6 made clear that Indians could be taxed on their allotted land upon issuance of a fee patent. Pet. App. 19.

The court of appeals thus held that Cass County could tax only those lands that were allotted to individual Indians pursuant to Section 3 of the Nelson Act (which incorporated the General Allotment Act) and that were patented after the Burke Act proviso was adopted in 1906 (which made clear Congress's intent to allow taxation). Pet. App. 22-23. The court further held that the County could not tax the eight parcels of land that were sold as pine lands or homestead lands under Sections 4, 5, and 6 of the Nelson Act, because those sections "did not incorporate the [General Allotment Act] or include any mention of an intent to tax lands distributed under them which might become reacquired by the Band." *Id.* at 22.

The dissent viewed *Yakima* as holding that "alienability of land allows taxation of land." Pet. App. 28. The dissent therefore concluded that, "[b]ecause all of the lands in this case are fully alienable by the Band," all of the lands should be subject to taxation. *Id.* at 28-29.

## SUMMARY OF ARGUMENT

This Court has consistently held that a State may not tax a Tribe or its members with respect to activities or property within the Tribe's reservation unless Congress has authorized the tax with unmistakable clarity. That rule reflects both the United States' preeminent role over relations with the Tribes, as mandated by the Constitu-

tion, and the sovereignty retained by the Tribes even after the formation of the United States. That rule applies with special force where, as here, a State or its political subdivision would tax reservation lands owned by a Tribe itself—a "'domestic dependent nation[]' that exercise[s] inherent sovereign authority over [its] members and territory." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)). A State should not be permitted to tax, and thus potentially to destroy, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)), a parallel sovereign except upon the clearest evidence that Congress has considered, and specifically consented to, such taxation.

No such evidence exists here. Congress has never expressed any intent to allow the Leech Lake Band, or even its individual members, to be taxed on the eight parcels of land at issue here. Petitioners concede as much. They contend, however, that this Court in *County of Yakima* v. *Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), abandoned, sub silentio, its venerable clear statement rule, and replaced it with a new rule that allows Tribes and individual Indians to be taxed on any lands that they may freely alienate. The Court adopted no such rule in *Yakima*. Instead, the Court followed what it recognized to be its "consistent practice of declining to find that Congress has authorized state taxation unless it has made its intention to do so unmistakably clear," *id.* at 258 (internal quotation marks omitted), and concluded that the General Allotment Act, as amended, constituted a clear expression of congressional intent to allow the taxation of lands allotted to individual Indians for which fee patents had issued, *id.* at 258-259. The court of appeals thus correctly recognized that Cass County could not, under this Court's decisions including



*Yakima*, tax tribally owned reservation lands whose taxability in Indian hands was never addressed by Congress.

In any event, even if the Court were to adopt petitioners' rule that "alienability equals taxability," the lands at issue here would not be taxable, because they are not freely alienable. The Indian Nonintercourse Act, 25 U.S.C. 177 (INA)—which requires congressional consent to the "purchase" or "other conveyance" of tribally owned lands—restricts the Band's ability to alienate those lands. Congress and the Executive Branch have recognized that the INA applies to all reservation lands held by a Tribe, including lands recently acquired in fee, and thus that a Tribe cannot dispose of such lands without permission from Congress.

## ARGUMENT

### I. CONGRESS HAS NOT GIVEN THE REQUISITE CONSENT TO STATE TAXATION OF TRIBALLY OWNED RESERVATION LANDS THAT WERE ACQUIRED BY NON-INDIANS UNDER THE NELSON ACT BUT LATER REACQUIRED BY THE BAND

#### A. A State Cannot Tax Tribally Owned Lands On A Reservation Unless Authorized By Congress With Unmistakable Clarity

1. This Court has long recognized that "Indian tribes and individuals generally are exempt from state taxation within their own territory." *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764 (1985); see *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) (observing "that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak"). The States and their political subdivisions are thus "without power to tax reservation lands and reservation Indians," except in those rare instances in which Congress has per-

mitted them to do so. *County of Yakima* v. *Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992); see *Blackfeet Tribe*, 471 U.S. at 765 (noting that Congress "has not done so often").

Congress will not be deemed to have authorized any exception to the general rule of Indian immunity from state taxation "unless it has 'made its intention to do so unmistakably clear.'" *Yakima*, 502 U.S. at 258 (quoting *Blackfeet Tribe*, 471 U.S. at 765). And any statute claimed to confer such authority will be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Blackfeet Tribe*, 471 U.S. at 766; see *Yakima*, 502 U.S. at 269 (noting that this principle is "deeply rooted in this Court's Indian jurisprudence"). The requirement that Congress must articulate—expressly, clearly, and unambiguously—any intent to allow state taxation of Tribes and their members in Indian country is a venerable one. See, *e.g.*, *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912) (although ordinarily "tax exemptions are strictly construed," the rule with respect to Indians "is exactly the contrary," so that "[t]he construction * * * is liberal" and "doubtful expressions * * * are to be resolved in [the Indians'] favor"). It has been reiterated, and applied, by the Court "consistent[ly]" to this day. *Yakima*, 502 U.S. at 258; see, *e.g.*, *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 508 U.S. 114, 123-124 (1993); *Bryan* v. *Itasca County*, 426 U.S. 373, 392-393 (1976).

The general rule of Indian immunity from state taxation, and the corollary that exceptions to that rule must be clearly authorized by Congress, derive from two sources: the federal government's "exclusive authority over relations with Indian tribes," and the Tribes' sovereignty within their own territories and over their own members. *Blackfeet Tribe*, 471 U.S. at 764; accord *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 168-169 (1973).



See also *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980) (noting that Congress's "broad power to regulate tribal affairs" and "the semi-independent position of Indian tribes" constitute "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members") (internal quotation marks omitted).

The Constitution grants Congress alone the power "[t]o regulate Commerce * * * with the Indian Tribes." Art. I, § 8, Cl. 3. The Indian Commerce Clause represents a deliberate repudiation by the Framers of the ambiguous and divided authority over Indian affairs that existed under the Articles of Confederation, which granted Congress "the sole and exclusive right of regulating the trade" and "managing all * * * affairs" with the Tribes, *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) but preserved "the legislative right of any State within its own limits." The Federalist No. 42, at 284 (J. Madison) (J. Cooke ed. 1982); see *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 558-561 (1832). So, too, the Constitution confers on the President, with the advice and consent of the Senate, the power to make treaties (Art. II, § 2, Cl. 2), and "by declaring treaties already made * * * to be the supreme law of the land, * * * admits [the Indian nations'] rank among those powers who are capable of making treaties." *Worcester*, 31 U.S. (6 Pet.) at 559. Against this background, the Court held in *Worcester* that "[t]he Cherokee nation * * * is a distinct community, occupying its own territory, * * * in which the laws of Georgia can have no force." *Id.* at 561.

Although *Worcester* concerned state criminal jurisdiction over Indian lands, "the rationale of the case plainly extended to state taxation within the reservation as well." *McClanahan*, 411 U.S. at 169. Accordingly, in *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867), the Court

held that Indian lands held in severalty or in common were exempt from state taxation. The Court explained that "[i]f the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' * * * separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union." *Id.* at 755. The Court likewise invalidated state taxes on reservation land owned by a Tribe in fee in *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867), terming the taxes and related provisions "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." *Id.* at 771.

The Court has continued to recognize the vitality of the principles of federal authority and tribal sovereignty expressed in the early Indian tax immunity cases. *Blackfeet Tribe*, 471 U.S. at 765; *McClanahan*, 411 U.S. at 169. The Court has applied those principles in holding that States may not tax the income of Indians living on a reservation (*McClanahan*, 411 U.S. at 165-166) or in other forms of Indian country (*Sac and Fox Nation*, 508 U.S. at 124-126); Indian-owned vehicles, mobile homes, and other personal property within Indian country (*id.* at 126-128; *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162-164 (1980); *Bryan*, 426 U.S. at 378-393; *Moe* v. *Salish and Kootenai Tribes*, 425 U.S. 463, 480-481 (1976); and reservation sales and purchases by tribal members (*Moe*, 425 U.S. at 480-481); *Colville*, 447 U.S. at 160; *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 453 (1995)).

2. The requirement that Congress speak with unmistakable clarity in order to abrogate Indian immunity from state taxation has special force where, as here, a State or its political subdivision seeks to tax either the Tribe itself



or the Tribe's own property or activities within its reservation. That is because state taxation of tribal governments—which "exercise inherent sovereign authority over their members and territories," *Potawatomi Indian Tribe*, 498 U.S. at 509—implicates principles of intergovernmental tax immunity in a manner that state taxation of individual Indians does not.[2]

Under the intergovernmental tax immunity doctrine, "the States can never tax the United States directly," *South Carolina* v. *Baker*, 485 U.S. 505, 523 (1988), absent express authorization by Congress. The doctrine also precludes the federal government, in many circumstances, from directly taxing the States. *Ibid.* While the tax immunity of the federal government derives from the Supremacy Clause, the tax immunity of the States derives from "the constitutional structure and a concern for protecting state sovereignty." *Id.* at 518 n.11. A State's direct taxation of a tribal government raises similar concerns, given the Tribes' position in the constitutional structure and the strong federal interest in protecting

---

[2] This Court's modern decisions in this area have usually involved state taxes imposed not on Tribes, but on individual Indians. To be sure, *Yakima* was a suit by a Tribe for declaratory and injunctive relief, "contending that federal law prohibited [county ad valorem] taxes on fee-patented lands held by the Tribe or its members." 502 U.S. at 256. The Tribe did not urge any distinction in the analysis to be applied to the two categories of land, perhaps because the suit was prompted by the county's threat to foreclose on those parcels that were held by individual Indians. See Resp. Br. at 9, *Yakima*, No. 90-408 ("Tribal members owning and living on fee lands within the reservation was at the root of this present controversy."). Nor did the United States focus on any such distinction in its brief as amicus curiae, perhaps because, as that brief pointed out (at 24), a special statute applicable to the Tribe provided (until its amendment in 1988, see Pub. L. No. 100-581, § 213, 102 Stat. 2941, ) that land acquired for the Tribe in fee "shall not, by reason of its being owned by the tribes, be exempt from taxation in accordance with the laws of the State of Washington." See 25 U.S.C. 608(c) (1982).

tribal sovereignty and promoting the economic self-sufficiency that is vital to tribal self-government.

We do not, of course, suggest that Tribes are identical to States for purposes of the intergovernmental tax immunity doctrine. Most significantly, because of Congress's plenary power over Indian affairs, Congress may authorize the States to tax Indian Tribes, *Yakima*, 502 U.S. at 258, even though Congress may not be able to subject a State to taxation by another sovereign in comparable circumstances. The Court has, however, made clear that "the tribes have retained a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." *White Mountain Apache Tribe*, 448 U.S. at 142 (internal quotation marks omitted); see *Potawatomi Indian Tribe*, 498 U.S. at 509 ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories") (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 17); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 140-142 (1982) (Indian Tribes "are unique aggregations possessing attributes of sovereignty over both their members and their territory") (quoting *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975)). It would seem to follow that a central attribute of the retained sovereignty of a Tribe—like that of the United States and the States—is the presumptive immunity of the Tribe and its property, within its own territory, from taxation by another sovereign.

The Court has further recognized that the federal government has a strong "substantive interest" in promoting "tribal self-government." *Moe*, 425 U.S. at 469 n.7; accord *Cabazon Band*, 480 U.S. at 216. While Congress at



the time of the General Allotment Act pursued an assimilationist policy designed to "put an end to tribal organization" and to "dealings with Indians * * * as tribes," *United States* v. *Celestine*, 215 U.S. 278, 290 (1909), Congress "repudiated" that policy with the Indian Reorganization Act of 1934. *Moe*, 425 U.S. at 479 (internal quotation marks omitted). That Act did not simply end the allotment process. It also sought to reinvigorate tribal relations, enhance the authority of tribal governments within their reservations, restore the national policy of dealing with the Indians as Tribes, "rehabilitate the Indian's economic life," and "give the Indians the control of their own affairs and of their own property." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934) and 78 Cong. Rec. 11,125 (1934) (statement of Sen. Wheeler)). The immunity of a Tribe and its reservation property from state taxation serves to ensure that the Tribe can fully devote its resources to the maintenance of the tribal government and the fostering of economic self-sufficiency.[3]

Congress and the Executive Branch have remained cognizant of the importance of tribal sovereignty. Congress, for example, recently reaffirmed the sovereign status of Tribes in the Federally Recognized Indian Tribe List Act of 1994, stating that "the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes." Pub. L. No. 103-454, § 103(2), 108 Stat. 4791 (reprinted in 25 U.S.C. 479a note). The regulations implementing that Act

---

[3] Cf. *Chickasaw Nation*, 515 U.S. at 464-465 (reserving question whether state income tax on tribal members who live outside Indian country but who are employed by the Tribe would constitute an impermissible interference with tribal self-government); *Sac and Fox*, 508 U.S. at 126 (same).

make clear that recognition entitles a Tribe to "the immunities and privileges available to * * * federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States." 61 Fed. Reg. 58,211 (1996) (quoting 25 C.F.R. 83.2). And President Clinton, like his recent predecessors, has issued a Memorandum on Government-to-Government Relations With Native American Tribal Governments expressing the federal government's commitment to tribal sovereignty. 30 Weekly Comp. Pres. Doc. 936 (Apr. 29, 1994).

Accordingly, although Tribes do not possess all of the attributes of sovereignty possessed by States or independent nations, see *White Mountain Apache Tribe*, 448 U.S. at 142, Tribes are recognized to be governments under the Constitution, this Court's decisions, and modern federal policy. It is thus appropriate that the intergovernmental tax immunity doctrine operate as a distinct constraint on the States' ability to tax tribal governments or their property. In view of the federal government's constitutionally exclusive authority over relations with the Tribes and its strong interest in protecting tribal sovereignty, a suitable constraint is to bar the States from taxing a tribal government, at least as to activities or property within its reservation, unless Congress has specifically consented to the taxation of the Tribe itself, and not simply of individual Indians. Such a rule will assure that Congress has considered, and deliberately chosen, to permit such a significant state encroachment on tribal sovereignty. See *Yakima*, 502 U.S. at 258 (observing that "the power to tax involves the power to destroy") (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)).[4]

[4] A similar distinction exists in the area of tribal sovereign immunity, a doctrine that applies only to the Tribes themselves, and not to their individual members. See, *e.g.*, *Potawatomi Indian Tribe*, 498 U.S. at 509-510. Although "Congress has always been at liberty to dispense with such tribal immunity or to limit it," *id.* at 510, Congress has done so only "occasionally," and with specific reference to Tribes. *Ibid.* See generally U.S. Amicus Br. 15-25, *Kiowa Tribe of Oklahoma* v. *Manufacturing Technologies, Inc.*, No. 96-1037 (argued Jan. 12, 1998).



### B. Congress Has Not Authorized The State Or Its Political Subdivision To Tax The Band On The Lands At Issue Here

Nothing in the Nelson Act, the General Allotment Act, or any other Act of Congress authorizes the State of Minnesota or its political subdivisions to tax the Leech Lake Band on any of its tribally owned reservation lands. The Nelson Act, when read together with the General Allotment Act, authorized only the taxation of individual Indians on their privately owned lands. We submit that Congress's silence as to the taxability of tribally owned lands should end the Court's inquiry here. If petitioners wish to tax tribally owned reservation lands, they must obtain express authorization to do so from Congress.

The Nelson Act likewise says nothing about the taxability, whether in individual Indian or tribal hands, of the particular properties that remain at issue at this stage of the case, *i.e.*, the eight parcels that were originally sold to non-Indians as pine lands or homestead lands under Sections 4, 5, and 6 of the Nelson Act. Nor has Congress on any other occasion authorized the State or its political subdivisions to tax those lands if restored to Indian ownership. Petitioners concede as much. See Br. 11 (acknowledging "the absence of express statutory language" permitting taxation of those lands). Accordingly, even if one assumes (contrary to our argument above) that Congress's grant of authority for States to tax individual Indians also constitutes authority to tax the Tribes themselves, Congress has not granted such authority here. Much less has Congress spoken with the unmistakable

clarity required by this Court's precedents. See *Yakima*, 502 U.S. at 258.

Petitioners argue (Br. 23) that Congress cannot be expected to have addressed the taxability of the pine lands and the homestead lands, because Congress "naturally presumed" that those lands would be "sold to non-Indian purchasers" who would be subject to state taxation, and that the lands would not be reacquired by the Band. But congressional silence cannot be equated with congressional consent to taxation in the event (however unlikely) that the Band did reacquire the lands. To do so would contravene this Court's clear statement rule.[5] Moreover, while Congress may have assumed during the allotment era that Tribes and tribal land ownership would soon be a thing of the past, see *Solem* v. *Bartlett*, 465 U.S. 463, 468 (1984), any such assumption has long since been discredited. Yet, Congress still has not acted to authorize state taxation of lands, such as those here, that a Tribe once sold to the United States for resale to non-Indians but later reacquired in fee. Cf. *Bryan*, 426 U.S. at 389 n.14 ("courts are not obligated in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship") (internal quotation marks omitted) (brackets in original).

Indeed, Congress has understood that reservation lands reacquired by a Tribe, whether in fee or in trust, are not generally subject to state or local property taxation. In 1970, Congress authorized the Farmers Home Administration to make loans to Tribes and tribal corporations to

[5] Congress doubtless also assumed that the lands would not be reacquired by the United States. But Congress's silence as to the State's authority to tax the land in the hands of the federal government obviously cannot be construed as authority to do so.



"acquire lands or interests therein within the tribe's reservation." Pub. L. No. 91-229, § 1, 84 Stat. 120 (codified at 25 U.S.C. 488). At the same time, Congress specifically exempted Tribes and tribal corporations from Section 334 of the Consolidated Farmers Home Administration Act of 1961, as amended, which states that "[a]ll property subject to a lien held by the United States * * * shall be subject to taxation by State, territory, district, and local political subdivisions in the same manner and to the same extent as other property is taxed." 7 U.S.C. 1984. Specifically, Congress provided that Section 334 "shall not be construed to subject to taxation any lands or interests therein while they are held by an Indian tribe or tribal corporation or by the United States in trust for such tribe or tribal corporation." § 5, 84 Stat. 120 (codified at 25 U.S.C. 492). Of course, if Congress had understood that lands reacquired by a Tribe in fee were already subject to state and local property taxation, that provision would have served no purpose.[6]

### C. This Court Has Not Adopted A Rule That "Alienability Equals Taxability" Of Tribally Owned Reservation Lands

Petitioners argue that no express congressional authorization is required to tax the Band on the pine lands and homestead lands that it reacquired on the Leech Lake Reservation. They contend (Br. 13-15) that *Yakima* aban-

[6] While the measure was pending before the Senate Committee on Interior and Insular Affairs, the Bureau of the Budget asked the Committee to consider whether "there is a real need to provide tax exemptions in this case." S. Rep. No. 393, 91st Cong., 1st Sess. 6 (1969). The Bureau reasoned that "the ability to purchase, manage, and mortgage property, which is assumed in this legislation, strongly suggests the existence of an ability to meet the other obligations of property ownership usually associated with fee title." *Ibid*. The bill ultimately reported by the Committee and passed by Congress nonetheless contained the "tax exemptions" provision.

doned the rule that States may not tax Tribes or their members in Indian country unless Congress has clearly authorized them to do so, and instead adopted a rule, supposedly derived from *Goudy* v. *Meath*, 203 U.S. 146 (1906), that States may always tax alienable lands held by Tribes or their members unless Congress has clearly prohibited them from doing so. But *Yakima* does not rest on any rule that Indian property is taxable by the States so long as it is alienable. Moreover, even assuming *arguendo* that *Goudy* rested on such a rule, that case did not involve tribally owned reservation lands, to which its rationale is unpersuasive. And this Court has declined since *Goudy* to equate the alienability of Indian property with its taxability by the States.

1. In *Yakima*, the Court concluded that the General Allotment Act, as amended by the Burke Act, provided a sufficiently clear expression of congressional intent to allow lands allotted to Indians under that Act to be subject to ad valorem taxation by the States or their political subdivisions. The Court did not, as petitioners suggest, abandon the longstanding rule that Congress must expressly authorize state taxation of Tribes and reservation Indians. To the contrary, the Court embraced that rule. The Court recognized that its "cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear.'" *Yakima*, 502 U.S. at 258 (quoting *Blackfeet Tribe*, 471 U.S. at 765).

The Court then applied that rule in holding that Section 6 of the General Allotment Act, as amended by the Burke Act, clearly reflected a congressional intent to permit state ad valorem taxation of the allotted lands. See *Yakima*, 502 U.S. at 258-259. The Court reasoned that "by specifically mentioning immunity from land taxation as one of the restrictions that would be removed upon conveyance in fee, Congress in the Burke Act proviso manifest[ed] a clear intention to permit the state to tax such Indian lands." *Id.* at 259 (internal quotation marks omitted). The Court thus concluded that "express authority for taxation of fee-patented land is found in § 6 of the General Allotment Act, as amended." *Id.* at 258. The Court's references to Congress's "specifically mentioning" taxation of fee lands, "manifest[ing] a clear intention" to allow taxation, and providing "express authority for taxation" refute petitioners' interpretation of *Yakima*. It is evident that the Court's decision rested principally on Section 6 of the General Allotment Act, as amended by the Burke Act, which specifically addressed the taxability of the allotted lands. It was not based on the alienability of the lands alone.



Petitioners' interpretation of *Yakima* is further undermined by Section III of the Court's opinion, which determined that, while the General Allotment Act authorized an ad valorem tax on the allotted lands, it did not also authorize an excise tax. See *Yakima*, 502 U.S. at 266-270. The Court reasoned that Congress expressly permitted the ad valorem tax, which "constitutes 'taxation of . . . land' within the meaning of the General Allotment Act," as amended by the Burke Act proviso. *Id.* at 266-267. But the Court held that an excise tax does not clearly constitute "taxation of * * * land" as authorized by that proviso. Applying the "principle deeply rooted in this Court's Indian jurisprudence" of construing ambiguous provisions to the benefit of Indians, the Court concluded that "[t]he short of the matter is that the General Allotment Act explicitly authorizes only 'taxation of . . . land,' not 'taxation with respect to land,' 'taxation of transactions involving land,' or 'taxation based on the value of land.'" *Id.* at 269. It was thus the General Allotment Act's express language, "taxation of * * *

land," that was determinative for the Court in *Yakima*, not the mere alienability of the land. See Pet. App. 13 ("If alienability always equals taxability, it should be the nature of the property right, not the nature of the tax, that matters. If that were the rule, the Court should have upheld both the ad valorem and the excise taxes.").[7]

2. Petitioners' confusion over *Yakima*'s holding presumably arises from the fact that "[n]either the Yakima Nation nor its principal *amicus*, the United States, vigorously disput[ed]" that Section 6 of the General Allotment Act, as amended, constituted a clear expression of congressional intent at the time to allow state ad valorem taxation of each individual allotment once a fee patent had issued, by removing the special protection from taxation that the General Allotment Act itself had imposed on that allotment. 502 U.S. at 259; see also *id.* at 266 ("the Tribe does not dispute * * * that this ad valorem tax constitutes 'taxation of . . . land' within the meaning of the General Allotment Act and is therefore prima facie valid"). The Court thus did not dwell at length on the issue. The Court instead focused on the Tribe's and the United States' arguments that "§ 6 of that Act—the Burke Act proviso included—is a dead letter" in view of subsequent developments in federal Indian policy. *Id.* at 259-260. It was in that context that the Court principally discussed *Goudy* v. *Meath*, an early case that held that

[7] A further indication that *Yakima* did not adopt a rule that alienability equals taxability is the Court's remand in that case to determine "whether the parcels at issue * * * were patented under the General Allotment Act, rather than under some other statutes," and, if so, "whether it makes any difference." 502 U.S. at 270. No such remand would have been necessary had the Court meant to equate alienability with taxability in all circumstances, whether or not the statute under which the lands were patented contained a clear statement of congressional intent to permit taxation. The mere fact that the lands had been "patented" in fee, under *any* statute, would have sufficed to render them taxable.



land allotted to an Indian in fee was taxable because, among other things, the land was alienable.

The Tribe and the United States argued in *Yakima* that the County was precluded from taxing the allotted fee lands under the Court's decision in *Moe*, which declined to apply the grant of personal jurisdiction in Section 6 of the General Allotment Act beyond the original Indian allottees. *Moe* had concluded that Section 6 could not be read as authorizing personal jurisdiction over subsequent Indian owners, given "the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands." 425 U.S. at 479. The Court determined in *Yakima* that those intervening statutes did not address the taxability of lands allotted to Indians under the General Allotment Act. See 502 U.S. at 264.

The Court thus concluded that the *result* of *Goudy*—*i.e.*, that an Indian is subject to state property taxes on allotted lands for which he has received a fee patent—was not undermined by *Moe* and the post-allotment statutes on which it relied. But the Court did not also conclude that the *rationale* of *Goudy* retains its vitality to the extent that it equated alienability with taxability—a conclusion that would have been contrary to what the Court understood to be its "consistent practice" of requiring an "unmistakably clear" expression of Congress's intent to authorize state taxation of Indians. *Yakima*, 502 U.S. at 258 (internal quotation marks omitted). The Court recognized that no such clear statement was provided by Section 5 of the General Allotment Act, the provision under which the lands in *Yakima* had been made alienable. Section 5 merely "implied" that the fee-patented lands would be subject to state property taxes. *Id.* at 264. It required "[t]he Burke Act proviso, enacted in 1906," to make "this implication of § 5 explicit, and its nature more clear." *Ibid.* Nothing in the Court's opinion suggests that

the taxability of the lands in *Yakima* would have been sustained without that "explicit" statement.

3. Contrary to petitioners' suggestions (Br. 10, 11-13), moreover, *Goudy* itself did not rest solely on the proposition that alienability, without more, was sufficient to permit taxation of the land at issue there. The Court based its decision on multiple rationales, no one of which was described as being independently sufficient.

One of those rationales is consistent with the clear statement rule subsequently enunciated by this Court in its Indian taxation cases. The Indian in *Goudy* had received his allotment under an 1854 treaty, which provided that the land "shall not be aliened, or leased for a longer term than two years," and "shall be exempt from levy, sale, or forfeiture" until the state legislature "remove[d] the restrictions" and Congress gave its consent. 203 U.S. at 147. The State adopted a statute in 1890 that purported to remove "all restrictions" on the land. *Ibid.* Congress gave its consent in 1893, albeit without specifically mentioning taxation. *Id.* at 147-148. The Court concluded, in light of the 1854 treaty language, that the restrictions had thereby been lifted, both on "voluntary alienation" (*e.g.*, sale or lease) and on "involuntary alienation" (*e.g.*, "any action or omission which in due course of law results in forced sale"). *Id.* at 149-150. Under this rationale, the Indian's land was taxable not because he could freely dispose of it, but because Congress had consented to the State's removal of all restrictions on the land, and thereby removed the prohibition against "levy" (*i.e.*, taxation). Cf. *The Kansas Indians*, 72 U.S. (5 Wall.) at 760-761.

The other *Goudy* rationale, relied upon by petitioners here, retains little persuasive force, especially as to tribally owned reservation lands (which were not involved in *Goudy*). Assuming that the only reason for exempting



an individual Indian's land from alienation or taxation was "protection of the Indian from the cunning and rapacity of his white neighbors," *Goudy* reasoned that "it would seem strange" for Congress to have sought to protect the Indian only from state officials, and not from others who might seek to separate him from his lands. 203 U.S. at 149. But there is another reason, since the enactment of the Indian Reorganization Act, to exempt tribally owned reservation lands from state taxation: the federal policy of promoting tribal sovereignty and economic development. It thus would not be at all "strange" for Congress to make such lands alienable but not taxable.[8]

4. Just six years after *Goudy*, this Court made clear that restrictions on alienation and exemptions from taxation are logically and legally distinct, *i.e.*, that the alienability of Indian lands does not automatically render them taxable by the States. In *Choate* v. *Trapp*, 224 U.S. 665 (1912), the Court held that Indian allottees had a constitutionally protected property right to a tax exemption during the originally prescribed trust period, and therefore that the tax exemption could not be terminated without their consent despite the government's lifting of restrictions on alienation.[9] The Court explained that

> the exemption and nonalienability were two separate and distinct subjects. One conferred a right and the

---

[8] As discussed in Part II, *infra*, moreover, the Band's tribally owned reservation lands are not freely alienable, as a result of the Indian Nonintercourse Act.

[9] The Court reasoned that the Indians had bargained for a tax exemption for the duration of the trust period, and therefore had been granted a property right that could not be taken without their consent. *Choate*, 224 U.S. at 674-679. The holding that the tax exemption was a constitutionally protected property right during the trust period obviously does not apply to the fee lands in this case. But *Choate* illustrates the significant legal distinction between alienability and taxability.

> other imposed a limitation. * * * The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant.

*Id.* at 673; accord *Carpenter v. Shaw*, 280 U.S. 363, 366-368 (1930).[10]

The Court's recent decisions confirm that alienability, without more, does not render Indian property subject to state taxation. If mere alienability were the touchstone, then the Court's decisions in *Sac and Fox Nation*, *Colville*, *Bryan*, and *Moe* would have been otherwise, given that the motor vehicles, mobile home, and other personal property held not to be taxable in those cases were doubtless alienable. See *Sac and Fox Nation*, 508 U.S. at 126-128 (post-*Yakima* decision); *Colville*, 447 U.S. at 162-164; *Bryan*, 426 U.S. at 378-393; *Moe*, 425 U.S. at 480-481.

---

[10] *Mahnomen County* v. *United States*, 319 U.S. 474 (1943), cited by the amici Counties (at 15-16), is consistent with *Choate* and subsequent cases on Indian tax immunity. In *Mahnomen*, the Court held that an Indian allottee was liable for state taxes because she had voluntarily paid them. 319 U.S. at 479-480. Although amici make much of the Court's statement that "[i]t is conceded that any limitation on the County's power to tax expired in 1928 with the termination of the twenty-five year trust described below," *id.* at 475, the Court found the requisite congressional intent to allow taxation in the specific language of the statute: "The Clapp Amendment gives the consent of the United States to state taxation, thus removing the barrier to taxation found to exist in *United States* v. *Rickert*, [188 U.S. 432 (1903)]; but under *Choate* v. *Trapp* the Indian, who has gained a 'vested right' not to be taxed, must also consent." 319 U.S. at 476-477. Furthermore, the land at issue in *Mahnomen County* was owned by an individual allottee, not the Tribe itself, and the tax years in question preceded the enactment of the Indian Reorganization Act in 1934.



## II. THE BAND'S TRIBALLY OWNED LANDS ARE NOT ALIENABLE, AND THUS ARE NOT TAXABLE IN ANY EVENT, AS A RESULT OF THE INDIAN NONINTERCOURSE ACT

There is an additional reason why, even under the "alienability equals taxability" rule urged by petitioners, the lands at issue here are not subject to taxation. Petitioners' argument rests on the mistaken premise that those tribally owned reservation lands are freely alienable by the Band. In fact, the Band is constrained by the Indian Nonintercourse Act, 25 U.S.C. 177 (INA), from disposing of its lands without congressional consent.[11] No such consent has been granted with respect to the lands here.

Beginning in 1790, Congress enacted a series of laws, pursuant to its its broad constitutional authority "to regulate commerce * * * with the Indian tribes" and over Indian affairs generally, that were aimed at controlling trade between Indians and non-Indians and protecting Indian lands from fraudulent purchase or conveyance.[12] The INA is one of those laws. See Act of June 30, 1834, ch. CLXI, § 12, 4 Stat. 730, reenacted as Rev. Stat. § 2116 (1875 ed.) (adopting INA in its current form). As currently codified, the INA provides, in pertinent part:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or

---

[11] All "laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes," were made applicable to the Leech Lake Reservation by the Treaty with the Chippewas, February 22, 1855, Art. VII, 10 Stat. 1169.

[12] See Act of July 22, 1790, ch. XXXIII, 1 Stat. 137; see also Act of Mar. 1, 1793, ch. XIX, 1 Stat. 329; Act of May 19, 1796, ch. XXX, 1 Stat. 469; Act of Mar. 3, 1799, ch. XLVI, 1 Stat. 743; Act of Mar. 30, 1802, ch. XIII, 2 Stat. 139; Act of May 6, 1822, ch. LVIII, 3 Stat. 682; Act of June 30, 1834, ch. CLXI, 4 Stat. 729.

> equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. 177. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 240 (1985) ("the Nonintercourse Acts simply 'put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States'").

The INA has been described as "perhaps the most significant congressional enactment regarding Indian lands." *United States ex rel. Santa Ana Pueblo* v. *University of New Mexico*, 731 F.2d 703, 706 (10th Cir.), cert. denied, 469 U.S. 853 (1984); see H.R. Rep. No. 1353, 96th Cong., 2d Sess. 15 (1980) ("One of the most important federal protections is the restriction against alienation of Indian lands without federal consent.") (referencing INA in discussion of Maine Indian Claims Settlement Act). The INA's "overriding purpose is the protection of Indian lands," which is achieved by "impos[ing] on the federal government a fiduciary duty to protect th[ose] lands." *Santa Ana Pueblo*, 731 F.2d at 706. While the particular justifications for the INA's restraints on the alienation of tribally owned lands have changed over time, the need for such restraints remains:

> Today, the statutory restraints on alienation of Indian land insulate Indian lands from the full impact of market forces, preserving the Indian land base for the furtherance of Indian values. If tribal land were not subject to restraints on alienation and tax immunities, market forces and state tax assessors would eventually erode Indian ownership of the reservation. * * * The continued enforcement of federal restrictions, in this view, derives not from a presumed incompetence of the "ward," but from a perceived value in the desirability of a separate Indian culture and polity.



*Felix S. Cohen's Handbook of Federal Indian Law* 509-510 (Rennard Strickland *et al.* eds., 1982).

The INA, by its terms, does not distinguish between lands held in fee by the Tribe and lands held in trust by the United States. See *United States* v. *Candelaria*, 271 U.S. 432, 442 (1926) (INA applies to lands of New Mexico Pueblo Indians even though they have "full title to their lands"); 18 Op. Att'y Gen. 235, 237 (1885). Nor does the INA distinguish among lands based on how or when the Tribe acquired them. See *Tonkawa Tribe of Oklahoma* v. *Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996) (INA "protects a tribe's interest in land whether that interest is based on aboriginal right, purchase, or transfer from a state"); *Tuscarora Indian Nation* v. *Federal Power Comm'n*, 265 F.2d 338, 339 (D.C. Cir. 1958) ("It makes no difference [to the applicability of the INA] how title to the land may have been acquired by the tribe."), rev'd on other grounds, 362 U.S. 99 (1960); *Alonzo* v. *United States*, 249 F.2d 189, 196 (10th Cir. 1957) ("the restrictions against alienation [in the INA] apply to lands acquired by the Pueblo through purchase, as well as to lands acquired by the Pueblo in any other manner"), cert. denied, 355 U.S. 1940 (1958).[13]

---

[13] This case is concerned only with tribally owned lands on a reservation, where the INA serves to preserve the tribal land base. The Court therefore need not consider whether the INA also applies to tribal fee lands outside of Indian country.

The substantive provisions of the 1834 Act—presumably including Section 12, 4 Stat. 730-731, which enacted the INA in its current form—were intended to apply to "Indian country," as defined in Section 1 of that Act, 4 Stat. 729. See *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 667-668 (1979) (quoting H.R. Rep. No. 474, 23d Cong., 1st Sess. 10 (1834)). By contrast, the predecessor INA provision, in Section 12 of the Act of March 30, 1802 (ch. XIII, 2 Stat. 143), had applied to all lands of Indian tribes "within the bounds of the United States." (Although Section 29 of the 1834 Act, 4 Stat. 734, repealed the 1802 Act, it further provided that the repeal did not "impair or affect" the 1802 Act "so far as the same relates to or concerns Indian tribes residing east of the Mississippi.") The definition of "Indian country" in Section 1 of the 1834

Congress, too, has recognized that the INA applies to lands, such as those here, that a Tribe acquired in fee by purchase from a non-Indian owner. Accordingly, when Congress has determined that such lands should be freely alienable by the Tribe, Congress has expressly so provided. In 1960, for example, Congress authorized the sale of fee lands owned by the Navajo Tribe. Act of June 11, 1960, Pub. L. No. 86-505, 74 Stat. 199 (codified at 25 U.S.C. 635(b)). Congress did so precisely because the Tribe would otherwise have been constrained by the INA from disposing of those lands without congressional approval:

> The Navajo Tribe has acquired in recent years with its own funds approximately 100,000 acres in fee simple. Under the provisions of Revised Statutes 2116 (25 U.S.C. 177), it appears that no one can safely acquire these lands by purchase or otherwise without the consent of the United States. This, of course, operates as a limitation on the power of the tribe to dispose of them as it sees fit. The committee believes that this disability should be removed in the case of the Navajo Tribe and that it should be free to manage its fee simple lands as it wishes.

---

Act was omitted from the Revised Statutes and therefore repealed, see *Wilson*, 442 U.S. at 668 (citing Rev. Stat. § 5596 (1875 ed.)), and the scope of that term was thereby left to judicial decision. See *Donnelly* v. *United* States, 228 U.S. 243, 268-269 (1913). In 1948, however, Congress enacted the current definition of Indian country in 18 U.S.C. 1151, which includes all lands within the boundaries of an Indian reservation, all dependent Indian communities, and trust or restricted allotments. See *Solem*, 465 U.S. at 468.

In recent times, Congress and the Executive Branch have assumed that the INA requires congressional approval of sales of all tribally owned lands, whether or not those lands are within a reservation. See, *e.g.*, Pub. L. No. 101-630, §§ 101(3) and (5), 104 Stat. 4531 (congressional finding that INA required approval of sale of tribally owned fee lands "located approximately one hundred twenty-five miles from the [tribal] land base").



H.R. Rep. No. 1648, 86th Cong., 2d Sess. 1-2 (1960) (citations omitted).

In recent years, Congress has continued to recognize that the INA restricts the alienability of tribally owned lands, including recently acquired lands held in fee. In 1987, Congress authorized the Rumsey Indian Rancheria, a federally recognized Tribe, to sell a parcel of land that it had obtained in fee the previous year. Pub. L. No. 101-630, § 102, 104 Stat. 4531. That statute contains an express congressional finding that "section 2116 of the Revised Statutes (25 U.S.C. 177) prohibits the conveyance of any lands owned by Indian tribes without the consent of Congress." Section 101(5), 104 Stat. 4531. And, in 1992, Congress authorized the Mississippi Band of Choctaw Indians to sell certain lands that it had acquired in fee a year earlier. Pub. L. No. 102-497, § 4, 106 Stat. 3255. Congress enacted that statute because "the Bureau of Indian Affairs advised the tribe that it cannot dispose of the property without Congressional approval." S. Rep. No. 428, 102d Cong., 2d Sess. 5 (1992).

Congress has not consented to the alienation of any tribally owned lands on the Leech Lake Reservation, and the Band acknowledges that the INA precludes any disposition of those lands without Congress's consent. See Br. in Opp. 8-9; Pet. App. 15 n.8. Accordingly, even if the Court were to accept petitioners' (mistaken) argument that "alienability equals taxability" of Indian lands, the tribally owned reservation lands at issue here still would not be taxable, because they are not freely alienable by the Band as a result of the INA.[14]

---

[14] Contrary to the view of the dissent below (Pet. App. 45-46), the Nelson Act did not permanently exempt the lands at issue (or any of the Band's lands) from the INA's restrictions on alienation. The Nelson Act addressed only the initial sale of the Band's lands that occurred a century ago. It did not address the alienability of those lands if reacquired by the Band at some later date. Nor did it purport to repeal

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*
LOIS J. SCHIFFER
*Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
BARBARA MCDOWELL
*Assistant to the Solicitor General*
JAMES C. KILBOURNE
JUDITH RABINOWITZ
SYLVIA F. LIU
*Attorneys*

JANUARY 1998

---

the provision of the 1855 Treaty that made the INA applicable to the Leech Lake Reservation. Treaty with the Chippewas, February 22, 1855, Art. VII, 10 Stat. 1169; see *Yakima*, 502 U.S. at 262 (noting the "cardinal rule . . . that repeals by implication are not favored"). Moreover, the Nelson Act authorized the Band to sell its unallotted lands only to the United States, and not to other parties. Since the INA does not apply to acquisitions of Indian lands by the United States, see *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 123-124 (1960), it would be particularly unwarranted to view the Nelson Act as implicating the INA here.